

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of  
Trademark Registration No. 2,772,766  
For the Mark SAN DIMAS GUITARS THE  
CALIFORNIA GUITAR COMPANY  
Registration Date: October 7, 2003

78190509

JACKSON/CHARVEL MANUFACTURING,  
INC.,

Cancellation No. 92042614

Petitioner,

v

PRINS, LLOYD A.,  
Registrant-Respondent

Trademark Trial and Appeal Board  
U.S. Patent and Trademark Office  
P.O. Box 1451  
Alexandria, VA 22313-1451

**REGISTRANT'S MOTION FOR  
SUMMARY JUDGEMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and 37 C.F.R § 2.127,  
Registrant, Lloyd A. Prins moves for summary judgement to dismiss Petition for  
Cancellation No. 92042614 declaring that there is no material issue of fact and that as a  
matter of law, Registrant conclusively has priority over the Petitioner.

Without priority, Petitioner's above-entitled cancellation must be dismissed, with  
prejudice.

Dated this 15 day of August, 2005

  
Lloyd A. Prins - Registrant

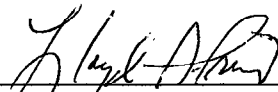


08-17-2005

**CERTIFICATE OF SERVICE**

I hereby certify that on this 15 day of August, 2005, a copy of the foregoing Registrant's Motion For Summary Judgement was served by first-class mail, postage pre-paid upon:

Salvador K. Karottki  
Goldberg, Kohn  
55 East Monroe Street, Suite 3700  
Chicago, IL 60603

  
\_\_\_\_\_  
Lloyd A. Prins – Registrant

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
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In the Matter of  
Trademark Registration No. 2,772,766  
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Registration Date: October 7, 2003

JACKSON/CHARVEL MANUFACTURING,  
INC.,

Petitioner,

Cancellation No. 92042614

v.

PRINS, LLOYD A.,

Registrant-Respondent

**MEMORANDUM OF LAW IN SUPPORT OF  
REGISTRANT'S MOTION FOR SUMMARY JUDGEMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Registrant, Lloyd A.

Prins hereby submits its Memorandum of Law in support of its Motion for Summary

Judgement, and in support thereof, states the follow:

**Preliminary Statement**

Since Petitioner first made application for U.S. registration for its SAN DIMAS trademark, it has continuously found itself playing catch-up and simply put, cannot prevail in this matter. Neither the facts nor the law will win Petitioner its mark. Petitioner filed its application for the SAN DIMAS mark *after* Respondent's mark obtained U.S. registration; its usage of the mark comes *after* Respondent's first date of use of its mark; and its lack of usage, or subsequent usage prevents Petitioner from overcoming the validity of Respondent's registration on the grounds of distinctiveness.

In short, Petitioner has no standing to file the instant cancellation proceeding, and its Petition must be denied.

## **ARGUMENT**

### **I. Standards for Summary Judgment**

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is proper where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P.56(c). The Supreme Court has stated that summary judgment is a salutary method of disposition “designed to secure the just, speedy and inexpensive determination of every action.” *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matushita Elec. Indus. Co v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The Federal Circuit and this Board have recognized that the purpose of summary judgement is one of judicial economy, that is, to save the time and expense of a useless trial where no genuine issue of material fact remains and more evidence than is already available in connection with the summary judgment could not reasonably be expected to change the result. *See Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 749 F.2d 624, 222 U.S.P.Q. 741 (1984).

Additionally, a dispute is genuine only if, on the entirety of the record, a reasonable jury could resolve a factual matter in favor of the non-movant. *Anderson*, 477 U.S. at 255-56; *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 1562, 4 U.S.P.Q.2d 1793, 1795 (Fed. Cir. 1987). Further, the Supreme Court has advised that the burden is not on the movant to produce evidence showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 326-27; *Sweats Fashions*, 833 F.2d at 1563, 4

U.S.P.Q.2d at 1796. Instead, the moving party discharges its burden by pointing out to the court that there is an absence of evidence to support the nonmoving party's case. *Id.*

As reflected in the attached Statement of Material Facts Not in Dispute, there are no factual matters in dispute, and, based upon applicable law discussed below, summary judgment against Petitioner is appropriate.

## **II. Petitioner Lacks Standing to Bring the Instant Cancellation Proceeding**

### **A. Respondent's Registered Mark is Valid.**

The presumption of validity may be rebutted, but can be done so only by a preponderance of the evidence. In this matter, Petitioner has provided no evidence to rebut the validity of Respondent's registered mark. The courts have consistently adhered to and articulated the statutory presumption of validity of registration and of ownership of a mark where the patent and Trademark Office has issued a Certificate of Registration. *See, e.g., In re Dixie Restaurants*, 105 F.3d 1405, 1408, 41 U.S.P.Q.2d 1531, 1534 (Fed. Cir. 1997), citing *Cosmetically Yours, Inc. v Clairol, Inc.*, 424 F.2d 1385, 1387, 165 U.S.P.Q.515, 517 (CCPA 1970) (one seeking cancellation must rebut presumption by a preponderance of the evidence); *Emergency One, Incorporated v. American Fire Eagle Engine Co., Inc.*, 332 F.3d 264, 268, 67 U.S.P.Q.2d 1124, 1128 (4<sup>th</sup> Cir.2003) (presumption of priority enjoyed by registrant of a mark is nationwide in effect); *Pfizer, Inc. v Y2K Shipping and Trading, Inc.*, 2004 WL 896952 (E.D.N.Y. 2004) (summary judgment of infringement granted to owner of registered VIAGRA trademark who enjoyed prior rights over common law user of TRIAGRA mark). Thus, according to the Lanham Act, the owner of a mark has "the exclusive right to 'register' a trademark...and to prevent his or her competitors from using that trademark." *Qualitex Co. v Jacobson Products Co., Inc.*, 514 U.S. 159, 162 (1995).

**B. Respondent Has Prior Use.**

Contrary to Petitioner's allegation, the evidence of record demonstrates that Registrant has, in fact, made a bona fide use of its mark in commerce prior to that of Petitioner. In particular, at least as early as October 24, 2002, Registrant has sold goods under its SAN DIMAS GUITARS THE CALIFORNIA GUITAR COMPANY trademark and continues today. By contrast, the only evidence of record as to Petitioner's bona fide use of its mark (as defined by 15 U.S.C. §1127 and the TMEP §901.01, §901.02, and §904) is found in its October 11, 2003 application for registry with the U.S. Patent and Trademark Office ("PTO"). In this application, Petitioner provides a trademark specimen which did not exist prior to July 2003. *See USPTO serial number 78312464.*

Through the discovery process, Petitioner made available 1,476 pages of documents for Respondent's review. The total 1,476 pages comprised of the following: a 1995 eight-page product brochure; a 1996 six-page product brochure; two one-page advertising brochures from 1995 and 1996; a thirty-one page Acquisition Agreement; four price sheets; and 1, 379 pages of internal control documents labeled confidential.

The TMEP at §904.05 ¶ 1 states that:

Advertising material is generally not acceptable as a specimen for goods. Any material whose function is merely to tell the prospective purchaser about the goods, or to promote the sale of the goods, is unacceptable to support trademark use. Similarly, informational inserts are generally not acceptable to show trademark use.

*Continuing at ¶ 2*

Moreover, material used by the applicant to conduct its internal business is unacceptable as a specimen of use on goods. These materials include all papers whose sole function is to carry out the applicant's business dealings, such as invoices, bill heads, waybills, warranties and business stationery.

In its Petition for Cancellation, Jackson/Charvel would have the Board believe that its use of the SAN DIMAS mark pre-dates Respondent's October 24, 2002 date of first use. With discovery closed, the record clearly shows that Petitioner cannot support this claim with any factual evidence.

Without proving use prior to that of a registrant, the unregistered owner of a mark cannot successfully challenge the validity of the registrant's mark. *See, e.g., Era Corporation v. Electronic Realty Associates, Inc.*, 211 U.S.P.Q.734 (TTAB 1981). In *Era*, for example, the Board held that petitioner had failed to provide prior similar use of its mark in a cancellation proceeding brought on grounds of likelihood of confusion under Section 2(d) of the Lanham Act, and therefore, has no standing. *Id.* The Board emphasized that it is incumbent upon the petitioner in such a proceeding to establish that the registration sought to be cancelled is inconsistent with a right the petitioner has acquired in the same or similar designation for like or similar goods. *Id.* at 745. The Board further stated.

Clearly, if the party plaintiff is not, as here, prior as between itself and the respondent, the plaintiff cannot be damaged by the existence of the registrations because it can then be reasonably argued that, if there could be a likelihood of confusion arising from the activities of the parties under their respective marks, it was the result of the use of the similar mark by the subsequent user, who traditionally had had the obligation to choose a mark not likely to conflict with that of a particular user. *This requirement of prior use is therefore necessary to bestow upon the plaintiff standing or a real interest in seeking to cancel the registrations involved in a cancellation process.*

*Id.* (Emphasis added).

Petitioner alleges that it will be damaged because Respondent's registered mark and Petitioner's marks are likely to be confused. However, so long as Petitioner cannot demonstrate ownership of a prior registered mark or use of a mark in commerce prior to

Registrant that is confusingly similar to Registrant's mark, Petitioner has no standing. *See, e.g., Prince Dog & Cat Food Co. v. Central Nebraska Packing Co.*, 305 F.2d 904, 134 U.S.P.Q. 366 (CCPA 1962); *Teter, Inc. v. Rheem Mfg. Co.*, 334 F.2d 784, 142 U.S.P.Q. 347 (7<sup>th</sup> Cir. 1964). *Cf. Cunningham v. Laser Golf Corporation*, 222 F.3d 943, 55 U.S.P.Q.2d 1842 (Fed. Cir. 2003) (senior user had standing to seek cancellation of junior user's mark, and junior user's mark LASERSWING was likely to create confusion as to senior user's LASER mark).

**C. Petitioner Cannot Show and Has Not Shown or Pled Distinctiveness of its Mark.**

In addition to the failure to prove prior use, Petitioner has failed to plead or demonstrate the distinctiveness of its mark. It is well-established that in a cancellation proceeding, the petitioner relying on an unregistered term to argue likelihood of confusion under Section 2(d) must prove distinctiveness, either by inherent distinctiveness or acquired distinctiveness through secondary meaning. *See Towers v. Advent Software, Inc.*, 913 F.2d 942, 16 U.S.P.Q.2d 1039 (Fed. Cir. 1990); see also *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 U.S.P.Q.40 (CCPA 1981) (distinctiveness requirement applied in opposition proceeding). In *Otto Roth*, the principles of which the Federal Circuit has held are equally applicable to cancellation proceedings, *see Towers*, 913 F.2d at 945-46, 16 U.S.P.Q.2d at 1041, the Court held:

Under section 2(d), as utilized in an opposition, confusion, or a likelihood thereof, is not recognized where one claiming to be aggrieved by that confusion does not have a right superior to his opponent's, or where he has not proved that that which he claims identifies him as the source of goods or services actually does so.

For the reasons set forth above, including Respondent's prior use and registration, and Petitioner's failure to prove prior use or distinctiveness, Petitioner fails to



demonstrate a case for the relief sought and the Petition to Cancel must be dismissed.

Respectfully submitted,

Dated this 15 day of August, 2005

  
\_\_\_\_\_  
Lloyd A. Prins – Registrant

**CERTIFICATE OF SERVICE**

I hereby certify that on this 15 day of August, 2005, a copy of the foregoing Memorandum of Law in support of Registrant's Motion For Summary Judgement was served by first-class mail, postage pre-paid upon:

Salvador K. Karottki  
Goldberg, Kohn  
55 East Monroe Street, Suite 3700  
Chicago, IL 60603

  
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Lloyd A. Prins – Registrant

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of  
Trademark Registration No. 2,772,766  
For the Mark SAN DIMAS GUITARS THE  
CALIFORNIA GUITAR COMPANY  
Registration Date: October 7, 2003

JACKSON/CHARVEL MANUFACTURING,  
INC.,

Cancellation No. 92042614

Petitioner,

v.

PRINS, LLOYD A.,

Registrant-Respondent

**REGISTRANT'S STATEMENT OF  
MATERIAL FACTS NOT IN DISPUTE**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and 37 C.F.R § 2.127,  
Registrant, Lloyd A. Prins hereby submits its Statement Of Material Facts Not In Dispute  
Memorandum in support of its Motion for Summary Judgement as to Petitioner  
Jackson/Charvel's Petition for Cancellation.

1. On December 3, 2002, Respondent, Lloyd A. Prins, applied for  
registration of his SAN DIMAS GUITARS THE CALIFORNIA GUITAR COMPANY  
trademark with the U.S. Patent and Trademark Office for use in connection with  
International Class 015; Musical instruments, namely electric guitars and electric basses.  
*Pursuant to TBMP § 528.05, this document likely already of record.*

2. On October 7, 2003, the U.S. Patent and Trademark Office issued a  
certificate of registration, Reg. No. 2,772,766 to Lloyd A. Prins for his mark SAN

DIMAS GUITARS THE CALIFORNIA GUITAR COMPANY in International Class 015. (Exhibit A attached)

3. Respondent's registered mark is based upon a first use date of October 24, 2002. *Pursuant to TBMP § 528.05, this document likely already of record.*

4. Respondent's first date of use is confirmed by the Declaration of Lloyd A. Prins, owner of the San Dimas Guitar Company. As Prins declares, the first use of his SAN DIMAS GUITARS THE CALIFORNIA GUITAR COMPANY trademark was in connection with the sale of his first guitar on October 24, 2002. (Exhibit B Attached)

5. Petitioner Jackson/Charvel Manufacturing, Inc. is engaged in the business of manufacturing and selling electric guitars and basses and is a wholly owned subsidiary of Fender Musical Instruments Corporation, a Delaware Corporation.

6. On October 11, 2003 Petitioner filed an application, U.S. Serial No. 78312464 for the word mark SAN DIMAS to be used in International Class 015; Electric guitars. (Exhibit C Attached)

7. In its application for registration, U.S. Serial No. 78312464, Petitioner provided a trademark specimen of its San Dimas mark as first used in July of 2003. (Exhibit D Attached)

8. On October 24, 2003 Petitioner filed a Petition For Cancellation to cancel Respondent's SAN DIMAS GUITARS THE CALIFORNIA GUITAR COMPANY trademark. *Pursuant to TBMP § 528.05, this document likely already of record.*

9. The record is devoid of any evidence that Petitioner's use of its SAN DIMAS trademark pre-dates Registrant's first use date of its SAN DIMAS GUITARS THE CALIFORNIA GUITAR COMPANY trademark. (Exhibit E Attached)

10. In its Petition To Cancel, Petitioner has not alleged distinctiveness of its mark which is the subject of its application 78312464. The record is devoid of any showing of distinctiveness of Petitioner's mark either by inherent distinctiveness or acquired distinctiveness.

Respectfully submitted,

Dated this 15 day of August, 2005

  
Lloyd A. Prins – Registrant

**CERTIFICATE OF SERVICE**

I hereby certify that on this 15 day of August, 2005, a copy of the foregoing Statement of Material Facts Not In Dispute in support of Registrant's Motion For Summary Judgement was served by first-class mail, postage pre-paid upon:

Salvador K. Karottki  
Goldberg, Kohn  
55 East Monroe Street, Suite 3700  
Chicago, IL 60603

  
Lloyd A. Prins – Registrant

**STATEMENT OF  
MATERIAL FACTS NOT IN DISPUTE**

**EXHIBIT  
A**

Int. Cl.: 15

Prior U.S. Cls.: 2, 21, and 36

United States Patent and Trademark Office

Reg. No. 2,772,766

Registered Oct. 7, 2003

TRADEMARK  
SUPPLEMENTAL REGISTER

*San Dimas*  
Guitars  
*The California Guitar Company*

PRINS, LLOYD A. (UNITED STATES INDIVIDUAL)  
2323 VIA SALDIVAR  
GLENDALE, CA 91208

NO CLAIM IS MADE TO THE EXCLUSIVE  
RIGHT TO USE "GUITARS" AND "GUITAR COMPANY",  
APART FROM THE MARK AS SHOWN.

FOR: MUSICAL INSTRUMENTS, NAMELY  
ELECTRIC GUITARS AND ELECTRIC BASSES, IN  
CLASS 15 (U.S. CLS. 2, 21 AND 36).

SER. NO. 78-190,509, FILED P.R. 12-3-2002; AM. S.R.  
6-19-2003.

FIRST USE 10-24-2002; IN COMMERCE 10-24-2002.

JOSETTE BEVERLY, EXAMINING ATTORNEY

Cancellation No. 92042614

**STATEMENT OF  
MATERIAL FACTS NOT IN DISPUTE**

**EXHIBIT  
B**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of  
Trademark Registration No. 2,772,766  
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JACKSON/CHARVEL MANUFACTURING,  
INC.,

Cancellation No. 92042614

Petitioner,

v.

PRINS, LLOYD A.,

Registrant-Respondent

**Declaration of Lloyd A. Prins  
Regarding Respondent's Date of First Use**

I, Lloyd A. Prins am the owner of the San Dimas Guitar Company, a privately held company located at 2323 Via Saldivar, Glendale, California 91208. I make this declaration on my own personal knowledge and submit the following in support my Motion for Summary Judgement.


1. On October 19, 2002 during a telephone conversation with a retail customer, I offered for sale my first San Dimas guitar for sale. The guitar was a double-cutaway model, metallic silver in color with the name "San Dimas" embossed across the front of the headstock.
2. After considering my offer, my customer contacted me on October 24, 2002, and agreed to purchase this first San Dimas guitar. The sale was recorded and documented on a retail sales invoice. A true and accurate copy of that invoice (with customer's name blocked) is attached to this declaration. (Attachment 1)

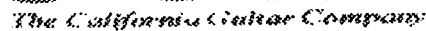


3. Upon receiving payment in full, on October 9, 2002 I personally packaged and shipped the first San Dimas guitar to my customer in North Dakota. Across the box's top flap and front panel I applied an adhesive label that read "San Dimas Guitar The California Guitar Company

The undersigned, being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the document resulting therefrom, declares that all statements made of his/her knowledge are true; and all statements made on information and belief are believed to be true.

Dated August 15, 2005

  
\_\_\_\_\_  
Lloyd A. Prins  
San Dimas Guitar Company



Date:  
10/24/02

**Cancellation No. 92042614**

To: \_\_\_\_\_  
 Addr: \_\_\_\_\_  
 Devils Lake, ND 58301

Vice	<input type="checkbox"/>
MC	<input type="checkbox"/>
Discover	<input type="checkbox"/>
Other	<input type="checkbox"/>

# CUSTOMER INVOICE

QTY	Description	Retail	Your Cost
1	San Dimas Prototype #1		450.00
	Deposit on SD "California Custom" (artwork to be supplied)		200.00
	Sales Tax		
	Shipping/Handling/Insurance		15.00
	Total	0.00	665.00

Thank you,

51-12

### Declaration of Lloyd Prins Regarding Date of First Use

## Attachment 1

Thanks 3

Uoy

San Dimas 007

Cancellation No. 92042614

**STATEMENT OF  
MATERIAL FACTS NOT IN DISPUTE**

**EXHIBIT  
C**

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[Prev Doc](#) [Next Doc](#) [Last Doc](#)[Logout](#) Please logout when you are done to release system resources allocated for you.[Start](#) List At:  OR [Jump](#) to record:  **Record 2 out of 4**[TARR Status](#) [ASSIGN Status](#) [TDR Status](#) [TTAB Status](#) ( Use the "Back" button of the Internet Browser to return to TESS)**Typed Drawing**

<b>Word Mark</b>	<b>SAN DIMAS</b>
<b>Goods and Services</b>	IC 015. US 002 021 036. G & S: Electric Guitars. FIRST USE: 19930622. FIRST USE IN COMMERCE: 19930622
<b>Mark Drawing Code</b>	(1) TYPED DRAWING
<b>Serial Number</b>	78312464
<b>Filing Date</b>	October 11, 2003
<b>Current Filing Basis</b>	1A
<b>Original Filing Basis</b>	1A
<b>Owner</b>	(APPLICANT) Jackson/Charvel Manufacturing, Inc. CORPORATION DELAWARE Suite 100 8860 E. Chaparral Road Scottsdale ARIZONA 85250
<b>Attorney of Record</b>	Oscar Alcantara
<b>Type of Mark</b>	TRADEMARK
<b>Register</b>	PRINCIPAL
<b>Live/Dead Indicator</b>	LIVE

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Cancellation No. 92042614

**STATEMENT OF  
MATERIAL FACTS NOT IN DISPUTE**

**EXHIBIT  
D**



Cancellation No. 92042614

**STATEMENT OF  
MATERIAL FACTS NOT IN DISPUTE**

**EXHIBIT  
E**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
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INC.,

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Petitioner,

v.

PRINS, LLOYD A.,

Registrant-Respondent

**Declaration of Lloyd A. Prins  
Regarding Petitioner's Response to Discovery**

I, Lloyd A. Prins am the owner of the San Dimas Guitar Company, a privately held company located at 2323 Via Saldivar, Glendale, California 91208. I make this declaration on my own personal knowledge and submit the following in support my Motion for Summary Judgement.

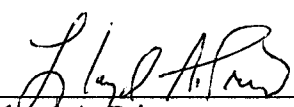
1. On September 23, 2004 I served Petitioner with Registrant's First Interrogatories to Petitioner; Registrant's First Request for Production of Documents; and Registrant's First Request for Admissions to Petitioner
2. On October 28, 2004 I received Petitioner's response to my first requests for discovery. Upon finding the replies to be lacking, on November 13, 2004 I sent Petitioner a letter requesting more full and complete replies.



3. Being unsuccessful with my October 28 request, on December 7, 2004 I filed a Motion with the TTAB to compel Petitioner to provide more thorough and complete responses.
4. On July 6, 2005 Petitioner provided supplemental responses to my first set of interrogatories. Upon executing a Confidentiality Agreement/Protective Order, Petitioner provided confidential documents Bates labeled JC00073 – JC01476.
5. In my First Request for Documents and Things, I asked Petitioner to provide any and all documents that would evidence Petitioner's use in any manner of the SAN DIMAS trademark. The items offered into evidence include advertising literature from 1995 and 1996, four Price Sheets, and over 1,300 pages of confidential company internal documents.
6. Now with discovery closed and having all documents and tangible thing that Petitioner believes evidences use, I am prepared to testify that there is nothing in evidence that supports Petitioner's claim of first and continuous use of a SAN DIMAS trademark commencing in June of 1993.

The undersigned, being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the document resulting therefrom, declares that all statements made of his/her knowledge are true; and all statements made on information and belief are believed to be true.

Dated August 15, 2005

  
\_\_\_\_\_  
Lloyd A. Prins  
San Dimas Guitar Company